

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TERRY LAMB)	
Claimant)	
)	
VS.)	
)	
GOODYEAR TIRE & RUBBER CO.)	
Respondent)	Docket No. 1,034,718
)	
AND)	
)	
LIBERTY MUTUAL INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) request review of the June 22, 2007 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

The Administrative Law Judge (ALJ) granted temporary total disability compensation to be paid by the respondent until the results of allergy testing are completed.

The respondent requests review of whether the claimant's alleged occupational disease arose out of and in the course of his employment. Respondent contends there is no medical evidence which establishes that claimant's skin rash is causally connected to claimant's work activities. Thus, respondent maintains the ALJ not only erred in concluding claimant met his evidentiary burdens, but also that the ALJ exceeded his jurisdiction in awarding claimant temporary total disability benefits, because claimant is capable of engaging in substantial gainful employment.

Claimant argues that the ALJ's Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant initially noticed his skin rash in April of 2006. When the rash did not resolve, claimant sought treatment from Dr. Myron J. Zeller, the plant physician on February 19, 2007. Dr. Zeller diagnosed a severe allergic response and took the claimant off work. While off work for a few weeks, claimant's skin condition improved.

Claimant returned to his job and continued to work for respondent. Thereafter his rash returned. On October 5, 2006, claimant and his coworkers at the plant went on strike, causing him to leave the plant. Six weeks after the claimant went on strike and was away from the plant his rash cleared.¹ Claimant went back to work for respondent on January 5, 2007 and his rash came back, this time more fiercely.² He stopped working for the respondent on February 16, 2007 when he was taken off work by Dr. Roxana Vocia, the physician respondent sent claimant to for further treatment. Dr. Vocia recommended claimant avoid exposure to chemicals and dirt within the workplace.³

To date, no physician has been able to specifically identify of any particular substance in the Goodyear plant as the cause of the claimant's rash. Dr. Vocia has recommended claimant undergo additional patch testing which requires respondent to provide sample substances found in the workplace, something respondent has yet to do. Nonetheless, it is uncontroverted that claimant's rash disappears when he is gone from the plant for a few weeks. And when he returns, so does the rash.

Claimant is not presently undergoing any active treatment. He is, however, waiting for the patch testing to be completed so he can know if it is acceptable to return to his former position with respondent.

Following the hearing, the ALJ entered an order which ordered respondent to pay temporary total disability benefits effective February 19, 2007, claimant's last day of work, until such time as the results of the allergy testing are produced. Shortly thereafter claimant's counsel indicates respondent made an accommodated position available to claimant in early July and has paid all of the TTD ordered. Respondent has yet, however, to provide the samples for the patch testing recommended by Dr. Vocia.

¹ Respondent's Brief at 3 (filed July 26, 2007).

² P.H. Trans. 18-19.

³ Respondent's Brief at 3 (filed July 26, 2007).

Respondent appeals the ALJ's Order asserting that the ALJ erred both in finding the claimant's occupational disease was caused by his work activities, absent a medical opinion which bolsters that contention, and in awarding TTD benefits because claimant is capable of working.

This member of the Board has considered the evidence, as presently developed, and believes the ALJ's Order should be affirmed as to the underlying compensability conclusion and the balance of the respondent's appeal should be dismissed for lack of jurisdiction.

Claimant asserts that he is suffering from an occupational disease which manifests itself into a skin irritation following exposure to a substance at work. While it is true that no medical professional has, to date, conclusively diagnosed this condition, the lack of such a conclusion or report is not fatal to claimant's occupational disease claim. Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.⁴

Here, the claimant's rash began while he was working for the respondent at the tire plant. Although that fact alone would not be sufficient to satisfy his evidentiary burdens, it is particularly telling that when he leaves the workplace for an extended period of time, the rash resolves. And when claimant returns to work, so does the rash. The fact that claimant has not come forward with a medical opinion at this juncture of the claim should not defeat his claim. This is especially true when respondent has failed to facilitate the patch tests that would rule out work as the source of this rash. As noted by the ALJ, respondent seems to hold the key to resolving this causation issue and cannot complain when it is unwilling to facilitate the testing. The ALJ's conclusion that claimant's occupational disease arose out of and in the course of his employment with respondent is affirmed.

As for respondent's claim that the ALJ erred in ordering the payment of TTD benefits, that aspect of the appeal is dismissed. The ALJ is charged with the authority to grant or deny requests for medical treatment and TTD benefits and the Board has no jurisdiction to consider those issues.⁵ When the record reveals a lack of jurisdiction, the Board's authority extends no further than to dismiss the action.⁶ Accordingly, respondent's appeal is dismissed as to the issue of TTD.

⁴ *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

⁵ K.S.A. 44-534a.

⁶ See *State v. Rios*, 19 Kan. App. 2d 350, Syl. ¶ 1, 869 P.2d 755 (1994).

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁷ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated June 22, 2007, is affirmed in part and dismissed in part.

IT IS SO ORDERED.

Dated this _____ day of September, 2007.

BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant
John A. Bausch, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge

⁷ K.S.A. 44-534a.